Supreme Court, U.S.
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No. 00-1667

In The

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court, First District

BRIEF IN OPPOSITION

PETER A. CANTWELL
Counsel of Record
PAUL H. SCHEUERLEIN
CANTWELL & CANTWELL
30 N. LaSalle Street, Suite 2850
Chicago, Illinois 60602
(312) 372-3000

Attorneys for Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., and Cantwell & Cantwell

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner, Gertrude Green, states that she is bringing this action individually and as Administratrix of the Estate of Sol Green. Sol Green died in the County of Cook, State of Illinois. There has never been, however, any evidence that letters of office were ever issued to Gertrude Green in the Estate of Sol Green.

Merrill Lynch & Co. Inc. is a Delaware corporation and the parent corporation of Merrill Lynch, Pierce, Fenner & Smith Inc., also a Delaware corporation.

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STATEMENT OF THE CASE

Petitioner, Gertrude Green (Mrs. Green), takes liberties in stating the facts as presented to the Illinois Appellate Court. Mrs. Green's Statement of the Case presents allegations of the Complaint (RC. 3) and contested allegations from the Affidavit of Claire Fischer (RC. 680) as if they were evidence. She presents disputed facts irrelevant to the issues decided by the Illinois Appellate Court, and omits material undisputed facts which are relevant to the issues decided. Many of the pronouncements in Mrs. Green's Statement of the Case are conclusions of law or fact which are not supported by the record in the Illinois Appellate Court. The pertinent undisputed material facts are set forth in the Order of the Illinois Appellate Court dated April 20, 2000 (App.A to the Petition).

It is important to note that this is not Mrs. Green's first attempt to attack Merrill Lynch's California Judgment. After the Honorable Irwin Cohen granted Merrill Lynch's Motion to Set Aside Fraudulent Conveyance on April 3, 1993, Mrs. Green appealed to the Illinois Appellate Court which affirmed Judge Cohen's decision on February 2, 1996. Then, on April 4, 1996, Mrs. Green filed her Petition for Leave to Appeal to the Supreme Court of Illinois, which was denied on June 5, 1996. In the meantime, on April 24, 1994, Mrs. Green filed a complaint in the United States District Court for the Northern District of Illinois seeking to vacate the California Judgment. When this was dismissed by order of October 18, 1994, Mrs. Green appealed to the Seventh Circuit Court of Appeals, which remanded the case with instructions to dismiss for want of subject matter jurisdiction (RC. 130-131). Thereafter, in April 1997, Mrs. Green filed the Complaint in the action *sub judice*.

The most egregious aspect of Mrs. Green's ill-conceived Petition lies in the fact that the underlying state court lawsuit from which this Petition emanates was an action for abuse of process, conspiracy and aiding and abetting, which was dismissed under the applicable statute of limitations. The lawsuit was not a petition to vacate a judgment, nor did it attempt to collaterally attack the California Judgment. In fact, Gertrude Green's own counsel argued quite adamantly during the course of the proceedings before the Honorable Michael Hogan in the trial court as follows:

> We are not standing before this Court seeking to vacate a judgment entered in California. We are standing in this Court seeking monetary damages on the basis of a cause of action for abuse of process, conspiracy and aiding and abetting. We're not here trying to vacate what was done in California.

(Report of Proceedings, January 26, 1998, p. 24). Thus, the federal question upon which Mrs. Green seeks review was neither raised in the trial court nor was it raised in the Illinois Appellate Court.

I. The California Suit

Mrs. Green's description of Merrill Lynch's lawsuit against Robert Green, Sol Green and others in California is misleading, incorrect and improper. A major portion of her description relies on nothing more than the allegations of her Verified Complaint against Merrill Lynch and Cantwell & Cantwell (RC. 3-18). Many of the allegations made in that Complaint were not within the personal knowledge of Mrs. Green and were not properly sworn to

by her. Many of the allegations made in that Complaint were controverted by Affidavits filed during the course of the proceedings in the Illinois state court (RC. 781 and 783). Moreover, it had been demonstrated during the state court proceedings brought by Merrill Lynch to enforce the California Judgment that Gertrude Green lacked credibility. For example, in sworn testimony, Gertrude Green had stated that she and Sol Green were divorced in March of 1961, yet thereafter Gertrude and Sol Green held themselves out as husband and wife and filed joint tax returns (RC. 847).

Petitioner's account of the so-called facts pertaining to the California litigation also relies on the Affidavit of Alison Boyd, one of the defendants in the California lawsuit (RC. 697-698). This Affidavit was never signed or notarized, and therefore is totally incompetent. Furthermore, the Affidavit consisted in large measure of inadmissible hearsay, and it was demonstrated in the state court that her assertions lacked credibility (RC. 792-793).

In her Statement of the Case, Mrs. Green misrepresents the nature of the California Complaint and the allegations against her husband. It was not a simple breach of contract action. The California Complaint (RC. 526-546) contained seven separate counts, six of which were directed at Sol Green, among others, and included causes of action for conversion and fraud. The allegations of the California Complaint, which were never properly denied by any of the defendants to that suit, supported the entry of the judgment of $24,928.64 against all of the defendants, together with punitive damages of $50,000.00, attorneys' fees of $8,000.00, interest of $1,544.55 and costs of $482.00. (App.E to the Petition).

Mrs. Green's attempt to once again assert these same incompetent and controverted facts is unwarranted. As the Illinois Appellate Court noted in its Order of April 20, 2000 (App.A to the Petition, pp. 10a-11a):

> . . . plaintiff seeks to establish that: (1) Sol Green's signature on the account agreement was forged; (2) Sol Green had resigned from Moving Up and did not know about the Merrill Lynch accounts; (3) Merrill Lynch knew that Sol Green resigned; (4) Merrill Lynch knew that Sol Green did not live or work in California when they served him with summons and complaint in California; (5) Sol Green was not indebted to Merrill Lynch; (6) Merrill Lynch is not the holder of a valid final judgment from California; (7) Merrill Lynch should not have been permitted to register its judgment in Illinois; (8) Gertrude Green did not receive the subject property via a fraudulent conveyance; and (9) the subject property was not properly sold via judicial sale. As the trial court correctly determined, each of these issues was litigated in the California proceeding in which plaintiff's TRO was dissolved, and in Illinois when defendants sought to register the California Judgment, and during (now) defendant's Petition to Set Aside Fraudulent Conveyance. Moreover, each issue was resolved against plaintiff and in favor of defendants.

II. Registration of the California Judgment in Illinois.

Petitioner's rendition of the procedural history of Merrill Lynch's efforts to register the California Judgment in the Illinois state court is equally flawed. Here, Mrs. Green relies heavily on the Affidavit of Claire Fischer

(RC. 680-683), her sister. Claire Fischer's Affidavit was, however, totally controverted by the Affidavits of Peter A. Cantwell (RC. 781-782) and Paul H. Scheuerlein (RC. 783-786), as well as the court orders entered in the proceedings in the Illinois state court.

Claire Fischer attested that she came to court on September 1, 1989, which was the return date for the Citation to Discover Assets issued against and served upon Sol Green. This is contradicted by the record. A Rule to Show Cause was properly issued on September 1, 1989 (RC. 785-810), but the Order does not reflect that Claire Fischer stepped before the bench on that day. The judge in the courtroom that day was the Honorable Randye Kogan, who is female. There was no male judge in the courtroom that day as stated by Claire Fischer in her Affidavit. When Claire Fischer did actually appear in court on behalf of Gertrude Green on January 30, 1990, it was reflected in the Order (RC. 829).

Claire Fischer stated in her Affidavit that neither she nor Sol nor Gertrude were served with a copy of Merrill Lynch's Special Motion for Entry of Default Judgment. This assertion is not supported by the record. Sol Green was provided with Notice of the Default Motion by regular mail as required by court rules (RC. 812). Claire Fischer was not entitled to receive Notice because, at that point in time, neither Merrill Lynch nor its attorneys were aware that Claire Fischer, a non-attorney, was attempting to represent the Greens, even informally. Mrs. Fischer also stated that neither she nor any member of the Green family was served with a copy of the Illinois Default

Judgment. Although service of a default judgment is not a requirement of Illinois law, Sol Green was informed of the Judgment of September 21, 1989, by correspondence dated October 4, 1989 (RC. 816).

Claire Fischer asserted in her Affidavit that she came to court on October 3, 1989, the return date of the Rule to Show Cause issued against Sol Green. If she did come to court on that day, she did not step before the bench and Merrill Lynch's attorney did not know that she was there. No transcript, court record or document has ever been produced to support her bald allegation. Furthermore, Merrill Lynch was not seeking a continuance at that time, but merely informed the court that the Rule to Show Cause had not been served upon Sol Green. Therefore, an Alias Rule to Show Cause was issued returnable November 7, 1989, as set forth in the Order entered that day (RC. 814).

Claire Fischer claimed in her Affidavit that she came to court on November 7, 1989, on the return of the Alias Rule to Show Cause issued against Sol Green. Once again, her presence is not reflected in the record. Mrs. Fischer's Affidavit implied that Merrill Lynch's attorney misrepresented the status to the court at that time when stating that Merrill Lynch's counsel had been contacted by Sol Green's counsel, who had asked for time to review the matter. Claire Fischer asserted in her Affidavit that Sol Green had not retained counsel at that time. However, Attorney Jeffrey Randall had contacted Merrill Lynch's counsel on November 3, 1989, stating that he might be filing an Appearance, informing counsel for Merrill Lynch that Sol Green was in the hospital and Gertrude Green was in Florida until November 21, and asking that

the supplementary proceedings be continued for one month (RC. 821). Merrill Lynch's counsel agreed to do this, and the Order of November 7, 1989 accurately reflects this agreement (RC. 823). If Mrs. Fischer was in court that day, and Merrill Lynch's counsel made representations to the court with which she disagreed, why did she not inform the court or Merrill Lynch's counsel at that time?

In addition, Gertrude Green's allegations set forth in her Statement of the Case concerning her Citation examination in March of 1990 were totally contradicted by the Affidavit of Paul H. Scheuerlein (RC. 785-786). Gertrude Green was never shown a document with Sol's signature and asked if it was his signature. Such a question was neither necessary nor appropriate. Gertrude Green did not ask for Visa receipts during the course of the Citation examination nor did she state at that time that Sol Green was not indebted to Merrill Lynch. During the course of the Citation examination, Gertrude Green did not state that Sol Green did or did not live or work in California, but she did state under oath that Sol Green had gone to San Diego to meet with Robert Green, one of the principals of Moving Up Corporation, and had loaned money to Robert Green. Paul Scheuerlein certainly never told Gertrude Green not to worry because Sol was dead.

Finally, Petitioner misconstrues Illinois law while accusing Respondents of improperly pursuing a Citation to Discover Assets before entry of an enforceable judgment. Mrs. Green ignores very clear Illinois law which provides that supplemental proceedings may begin as soon as the foreign state judgment is registered, and registration occurs when the petition, with judgment attached, is filed in Illinois. *Chatham v. Chatham*, 54 Ill.

App. 3d 633, 636, 370 N.E. 2d 50, 53, 12 Ill. Dec. 427, 430 (1st Dist. 1977).

III. Satisfaction of the California Judgment in Illinois

Merrill Lynch did eventually manage to obtain payment of its California Judgment by means of a successful Petition to Set Aside Fraudulent Conveyance filed in the Illinois state court which resulted in the eventual public sale of real estate belonging to Sol Green. In her Statement of the Case, Mrs. Green disingenuously characterizes the transfer of the real estate from Sol Green to her as a "purported" fraudulent conveyance. There is nothing "purported" about it. In his Order of April 13, 1993 (RC. 847-848), Judge Cohen concluded that the conveyance was fraudulent. His conclusion was upheld by the Illinois Appellate Court which found that the record in that case conclusively established that Merrill Lynch had proven fraud-in-law. (App.A to the Petition, p. 4a).

Petitioner correctly states that, while the Illinois enforcement action was proceeding, an action was filed in California on behalf of Sol Green to set aside the California Judgment. Although that proceeding was eventually dismissed for the Estate's failure to appear, Petitioner neglects to mention that the Honorable J. Richard Haden, of the Superior Court of California, County of San Diego, had previously denied the Green's Motion for Preliminary Injunction, finding that their application to the California court contained improper evidence lacking in foundation and containing improper opinion (RC. 221).

Mrs. Green also states that Judge Cohen did not permit her to challenge the validity of the California Judgment. Nevertheless, every judge who has ever reviewed the facts of the history of litigation between Merrill Lynch and the Greens has found that there were numerous attacks on the California Judgment by the Greens. As early as 1994, Judge Marovich of the United States District Court for the Northern District of Illinois stated that "Green and his estate has had ample opportunity to challenge Merrill Lynch's claim. . . . " (App.A to the Petition, p. 4a). In 1998, Judge Hogan also found that the issues were litigated in California on the Motion for Preliminary Injunction and could have been raised before the Honorable Thomas Quinn on the Petition to Register Foreign Judgment in Illinois. (App.B to the Petition, p. 17a). Judge Hogan's conclusions were upheld by the Illinois Appellate Court in its Order of April 20, 2000. (App.A to the Petition, p. 11a).

REASONS FOR DENYING THE WRIT

I. Neither the Record Nor the Decision Below Raises the Question Presented in the Petition.

Petitioner cavalierly announces in a footnote on page 10 of her Petition, without any citation to authority, that, given the lower court's failure to address the invalidity and unconstitutionality of the California Judgment, the lower court's grounds for dismissal are not valid or a bar to the relief Petitioner seeks here. The purported invalidity and unconstitutionality of the California Judgment was, however, never raised in the case below.

The case below involved a complaint against Respondents seeking damages for abuse of process, conspiracy, and aiding and abetting. Not only were constitutional issues never raised, but Petitioner's own counsel in the state court action emphatically proclaimed that they were not trying to vacate what was done in California. A lawsuit which does not address the validity of the California Judgment cannot possibly serve as the foundation for Petitioner's request for a review of the California Judgment by this Court.

II. The Illinois Appellate Court Cited Alternative Grounds in Upholding the Dismissal of Gertrude Green's Complaint

The trial court below dismissed Mrs. Green's Complaint on three different bases. (App.B to the Petition, 17a). The trial court found that the Complaint was barred by *res judicata* and collateral estoppel, that the cause of action for abuse of process was barred by the applicable statute of limitations, and that the causes of action for conspiracy and aiding and abetting could not stand because Cantwell & Cantwell acted as the agent for Merrill Lynch. The Illinois Appellate Court affirmed the trial court, concluding that Mrs. Green was precluded from presenting her claims because of the statute of limitations, and under the doctrines of *res judicata* and collateral estoppel. Because the Illinois Appellate Court determined that the application of the appropriate statute of limitations was dispositive of all of Mrs. Green's claims, the Justices declined to consider the matter of whether a principal and an agent can be liable for civil

conspiracy or aiding and abetting. (App.A to the Petition, pp. 5a-15a). Thus, this is not a good case for granting certiorari because several grounds exist for the Illinois Appellate Court's decision to affirm the trial court.

III. Petitioner Misstates Illinois Law

In her Petition, Mrs. Green accuses Merrill Lynch and its counsel of manipulating the Illinois courts and rules of procedure over a period of four years in order to obtain the Greens' property. Supposedly, Merrill Lynch began this course of conduct by improperly issuing a Citation to Discover Assets against Sol Green simultaneously with the filing of a Petition for Registration of Foreign Judgment against Sol Green. In making this accusation, Petitioner neglected to review Illinois law applicable in 1989.

Section 12-606 of the Uniform Enforcement of Foreign Judgments Act provided:

> **Levy.** At any time after registration and *regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained,* a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to enforcement or other judicial process for satisfaction of judgments.

Ill.Rev.Stat. (1989), ch. 110, para. 12-606 (emphasis added). "Levy" is defined in Section 12-601(c) as follows:

> . . . to take control of or *create a lien upon property under any judicial process* whereby satisfaction of a judgment may be enforced against such property.

Ill.Rev.Stat. (1989), ch. 110, para. 12-601(c) (emphasis added). As stated by the First District Appellate Court in *Chatham v. Chatham*, 54 Ill. App. 3d 633, 636, 370 N.E.2d 50, 53, 12 Ill. Dec. 427, 430 (1st Dist. 1977):

> . . . it is clear that the Uniform Act is an enforcement statute which authorizes a levy of execution on property as soon as the foreign judgment is registered and before jurisdiction is obtained over the judgment debtor to prevent him from removing the assets before the foreign judgment becomes final in the forum state.

Furthermore, under Illinois law, Ill.Rev.Stat. (1989), ch. 110, para. 2-1402, a citation to discover assets is a method by which a judgment creditor may proceed against a judgment debtor to discover and recover assets in satisfaction of the judgment. A lien is created on all personal property belonging to the debtor upon service of the citation to discover assets. *Pontikis v. Perazic*, 295 Ill. App. 3d 478, 484, 692 N.E.2d 712, 716-17, 229 Ill. Dec. 723, 727-28 (1st Dist. 1998).

By statute, a foreign judgment is registered at the time a petition for registration is filed. Ill.Rev.Stat. (1989), ch. 110, para. 12-603. Thus, Merrill Lynch's initiation of Citation proceedings against Sol Green immediately after filing its Petition to Register Foreign Judgment was entirely proper under Illinois law. *See Marriage of McElwee*, 230 Ill. App. 3d 714, 595 N.E.2d 738, 172 Ill. Dec. 377 (5th Dist. 1992) (judgment creditor entitled to initiate a non-wage garnishment proceeding as soon as a foreign judgment is registered); *Morrow v. Westphal*, 167 Ill. App. 3d 433, 521 N.E.2d 283, 118 Ill. Dec. 215 (3rd Dist. 1988) (non-wage garnishment of judgment debtor's property

could be initiated in proceeding for enforcement of foreign judgment before enforcing court confirmed final judgment).

IV. This Case Does Not Have Constitutional Implications.

In a vain and frivolous attempt to grab this Court's attention, Petitioner asserts that the California Judgment offends the principles of due process espoused in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In hopes of creating an issue worthy of writ consideration, Petitioner misrepresents the nature of Merrill Lynch's claims against the defendants in the California lawsuit, as well as the judgment which resulted from those claims. Contrary to Petitioner's argument before this Court, the California Judgment fully comports with California law. Moreover, punitive damages of $50,000.00 on a compensatory damage claim of approximately $25,000.00, jointly and severally against a corporate defendant and three individual defendants, is reasonable, appropriate, and totally inoffensive.

Nevermind the fact that at no time in the history of the almost thirteen years of litigation between Merrill Lynch and the Greens has Sol Green or Gertrude Green ever presented an argument concerning the legality or constitutionality of the punitive damage award. In *Gore*, this Court stated that a punitive damage award enters the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment only when it can be characterized as grossly excessive in relation to the State's legitimate interests in punishment and deterrence. *Id.* at

568. Unlike the 2 to 1 ratio in the matter *sub judice*, the ratio of punitive damages to compensatory damages in *Gore* was a "breathtaking" 500 to 1. *Id.* at 583.

Furthermore, the California Complaint filed by Merrill Lynch against Sol Green and others does disclose the perpetration of deliberate false statements and acts of affirmative misconduct. It was not just a simple breach of contract action, as stated by the Petitioner. On the contrary, the Complaint alleged seven separate counts, six of which were directed at Sol Green, among others, and included causes of action for the independent torts of conversion and fraud. Thus, not only is the punitive damage award reasonable in a constitutional sense, but it also comports with California law.

It is astounding to Respondents that, in light of the record of this case, Mrs. Green can come before this Court and assert that she has not had an opportunity to attack and set aside the California Judgment. Judge Hogan noted, in his Order of January 26, 1998, that the Greens had the opportunity to collaterally attack the California Judgment when Merrill Lynch filed its Petition to Register Foreign Judgment in Illinois, and directly attacked the California Judgment in California on the Motion for Preliminary Injunction. Judge Marovich of the United States District Court for the Northern District of Illinois also found that the Greens had ample opportunity to challenge Merrill Lynch's claim. In fact, all of the issues which Petitioner now presents to this Court have been found by the Illinois Appellate Court to have been raised previously and resolved against Petitioner and in favor of Respondents. Mrs. Green's assertions before this Court are patently false.

V. The Illinois Appellate Court Decision Is Fact-Bound and Will Lack Significant Impact on Other Cases.

When the grandstanding and hyperbole of Mrs. Green's Petition is stripped away, this Court is left with nothing but a typical case of applying undisputed facts to established state law. Mrs. Green had the opportunity to present the facts to the trial court to support her claims. Both the trial court and the Illinois Appellate Court held that the facts she submitted were insufficient. Interestingly, Petitioner does not actually argue that the courts below erred in their respective opinions. Rather, the courts below are accused of failing to address an issue, *sua sponte*, that was never raised by Petitioner in those proceedings. Nevertheless, the decisions below gave full consideration to the facts presented and decided the issues raised correctly. Any legal error which might possibly be found would be unique to this case. Thus, it is not well-suited for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, Gertrude Green's petition for writ of certiorari should be denied.

Respectfully submitted,

PETER A. CANTWELL
Counsel of Record
PAUL H. SCHEUERLEIN
CANTWELL & CANTWELL
30 N. LaSalle Street, Suite 2850
Chicago, Illinois 60602
(312) 372-3000

Attorneys for Respondents Merrill Lynch, Pierce, Fenner & Smith Inc., and Cantwell & Cantwell